

NA 04-0096-C B/H J Russell Flowers v ACBL  
Judge Sarah Evans Barker

Signed on 3/10/05

**NOT INTENDED FOR PUBLICATION IN PRINT**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
NEW ALBANY DIVISION

J. RUSSELL FLOWERS, INC.,	)	
	)	
Appellant,	)	
vs.	)	NO. 4:04-cv-00096-SEB-WGH
	)	
AMERICAN COMMERCIAL LINES, LLC,	)	
ET AL,	)	
	)	
Appellee.	)	

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
NEW ALBANY DIVISION

J. RUSSELL FLOWERS, INC.; JEM	)	
TRANSPORTATION, INC.; AND PML,	)	
INC.,	)	
	)	4:04CV-0096-SEB-WGH
Appellants,	)	4:04CV-0097-SEB-WGH
	)	4:04CV-0098-SEB-WGH
vs.	)	
	)	
AMERICAN COMMERCIAL LINES, LLC et	)	
al.,	)	
Appellees.	)	
IN RE:	)	
AMERICAN COMMERCIAL LINES, LLC, et	)	Bankruptcy Case No.
al.,	)	03-90305-BHL-11
Debtor(s).	)	

**ORDER AFFIRMING IN PART and REVERSING/MODIFYING IN PART THE  
BANKRUPTCY COURT’S GRANT OF SUMMARY JUDGMENT<sup>1</sup>**

This appeal challenges decisions by the Bankruptcy Court in its summary judgment rulings of April 28, 2004, resolving disputes arising in the context of a Chapter 11 bankruptcy proceeding involving fifteen (15) related commercial entities (“Debtors”) engaged in the business of marine transportation. These Debtors leased barges from a group of owners/claimants, pursuant to agreements referred to as Charters. Debtors opted to reject these contracts as a part of their Chapter 11 reorganization. Following the court orders granting the rejection of these contracts, differences arose concerning the arrangements for payment of the damages incurred by Owners. Owners basically maintain that their entitlements under the

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<sup>1</sup> The parties’ requests for oral argument in this case are hereby DENIED.

Charters should have been classified as administrative costs. The bankruptcy court held otherwise, which prompted these appeals. The parties have consolidated these three cases before the bankruptcy court and in this appeal because of the similarity of issues raised in each.<sup>2</sup>

As explained below, we affirm in part, and reverse/modify in part the bankruptcy court's April 28, 2004, Findings of Fact, Conclusions of Law and Summary Judgment Order.

### STANDARD OF REVIEW

A district court's review of bankruptcy decisions is appellate in nature, requiring us to apply the same standards as are applicable in other appellate contexts. The district court (as well as a court of appeals) will uphold the bankruptcy court's findings of fact unless they are clearly erroneous; legal conclusions, however, are reviewed *de novo*. In re Smith, 286 F.3d 461, 465 (7th Cir. 2002). In this case, the bankruptcy court made its determinations based on essentially undisputed, stipulated facts; accordingly, our review consists of an independent, *de novo* examination of the reasoning of the bankruptcy judge without according to that decision presumptive weight or deference. Halas v. Platek, 239 B.R. 784, 788 (N.D. Ill. 1999); Smoker v. Hill & Assocs., Inc., 204 B.R. 966, 971 (N.D. Ind.1997). Federal Rule of Bankruptcy Procedure 8013 provides that "[o]n appeal the district court ... may affirm, modify, or reverse a bankruptcy judge's judgment, order or decree or remand with instructions for further proceedings." Our jurisdiction to resolve this appeal is set out at 28 U.S.C. § 158(a)(1).

### BACKGROUND FACTS

Appellants are three owners who are also the lessors/charterers of commercial barges: J. Russell Flowers, Inc.; JEM Transportation, Inc.; and PML Inc. ("Owners" or "Claimants").

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<sup>2</sup> This Chapter 11 bankruptcy proceeding has generated at least two additional appeals to the district court; see, 4:03-cv-00146-DFH-WGH and 1:05-cv-00286 SEB-VSS

Appellees are American Commercial Barge Line LLC and 14 affiliated entities (“ACBL” or “Debtors”), all of whom are engaged in the business of providing commercial marine transportation of commodities. Debtors’ cases were jointly administered in the bankruptcy proceedings and American Commercial Barge Lines, LLC (Bankruptcy Case No. 03-90305) was and remains the lead petitioner.

On January 31, 2003 (the “Petition Date”), Debtors filed voluntary petitions for reorganization under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 101 *et. seq* (the “Code”). Debtors, including ACBL, as debtors-in-possession, continued to operate their businesses and manage their properties, pursuant to 11 U.S.C. §§ 107(a) and 108. Appellants’ Br. at 9.

As of the Petition Date, Debtors were leasing commercial barges from the Owners pursuant to charter agreements (the “Charters”).<sup>3</sup> Three months later, on April 29, 2003, Debtors moved to reject the Charter agreements, pursuant to § 365(a) of the Bankruptcy Code [R. 575], which motion was granted following a hearing on May 14, 2003 (the “Rejection Date”). The court also made that date the effective date of the rejection. R. 640.

At the time Debtors filed their motion to reject the Charters, they were operating a total of 135 leased barges over hundreds of miles of inland waterways, most of which vessels were loaded and traveling together in fleets. In anticipation of the Court’s rejection order, as early as April, 2003, Debtors had undertaken the process of returning some the barges to their Owners. Appellees’ Br. at 4. Upon the return of the barges, Owners were able to and did re-charter a

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<sup>3</sup>ACBL leased sixty six (66) barges from Flowers, ten (10) barges from JEM, and fifty-nine (59) barges from PML. Appellant’s Br. at 5-6.

majority of the barges at a daily rate,<sup>4</sup> often redeploying them within only a few days of their redelivery. Appellants' Br. at 15; Appellees' Br. at 5.

The Charters laid out the contract terms controlling the hiring of the barges, detailing the respective obligations of the parties. Certain of these obligations, referred to as Off-Charter Expenses, imposed on the lessees (Debtors here) responsibilities triggered by the returns of the barges to their Owners. For example, the Charters required the lessees to submit the returned barges to a marine surveyor for an off-charter survey (which basically, as we understand it, was to determine the condition of a returned barge) and allocated the costs of such surveys evenly between the Charterer and the barge owner. Appellants' Br. at 14. The Charters also allocated repair costs necessitated by the findings in the redelivery marine survey.<sup>5 6</sup>

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<sup>4</sup>The daily rate was \$70.00 per barge per day. (Appellants' Br. at 15)

<sup>5</sup>Section 13 of the Flowers and JEM Charters pertains to redelivery of barges and states, in applicable part, as follows:

(a) Upon the expiration of this Charter, the Barges, ... shall be redelivered, at Charterer's expense to Flowers [or JEM], empty, cleaned and in as good condition and working order as when first delivered to Charterer for service under the Original Charter, ordinary wear and tear only excepted. [...]

(b) Upon redelivery or repossession, each of the Barges shall be dry docked and surveyed ... If repairs are necessary in order to bring the Barges into the condition required on redelivery under this Charter, said repairs shall be promptly made by Charterer, at its expense and cost. It is understood and agreed that Basic Charter Hire shall continue during such period as may be reasonably necessary to survey any Barge and, if necessary, to complete the repairs.

(c) The redelivery survey shall provide an assessment of the general condition of each Barge as well as a recommended

(continued...)

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<sup>5</sup>(...continued)

plan for implementing any corrections of deficiencies in the condition of the Barges over and above ordinary wear and tear so that the Barges are in the condition required by this Charter. In the event that the redelivery survey identifies any deficiency in the condition of the Barges and Charterer fails to remedy the same, Flowers [or JEM] reserves the right to repair, remedy or renovate the same for the account of Charterer, reserving all rights it may have hereunder against Charterer for the costs thereof.

R. 1241, Exs. 1-4, § 13; R. 1238, Ex. 1, § 13.

(continued...)

The May 14, 2003, Rejection Order relating to the Charters directed Debtors to continue to pay daily charter hire rates on each individual boat or barge after the date of the order was entered until the time when the owner was notified that the boat or barge was available for pick up “without prejudice to any claims owners may wish to assert as to other obligations they claim Debtors have pursuant to the charter,” and reserving for later determination any issues as to the

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<sup>5</sup>(...continued)

<sup>6</sup>Section 3 of the PML Charter similarly addresses redelivery and states:

(a) Upon expiration of the Charter Period, Charterer shall redeliver the Barges, ... in the same good order and condition as when delivered, ordinary wear and tear excepted.

(b) Prior to redelivery of the Barges, Owner and Charterer shall appoint a mutually agreeable marine surveyor who shall make a general condition survey of each of the Barges (hereinafter the “Off-Charter Survey”). The surveyor’s determination of “normal wear and tear” versus “damage,” for which Charterer is responsible, shall be binding on Owner and Charterer. Each party shall equally share all costs related to the Off-Charter Survey.

(c) The obligations of the Charterer shall be fixed and determined upon the basis of the Off-Charter Survey at the time of redelivery of said Barges as compared to the On-Charter Survey. Should any dispute arise between Owner and Charterer with respect to responsibility for repairs or as to the condition of the Barges at the time of redelivery, either Charterer or Owner may, without prejudice to its contentions, make and pay for such repairs, renewals or replacements, either before or after tender or redeliver, and may recover the costs thereof from the party for whose account it may be under the terms of this Charter, in the event such party’s liability for such repairs, renewals or replacements is established.

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(e) To the extent applicable, Charter Hire for each Barge shall continue following the Off-Charter Survey until such time as required repairs to the Barges have been made and the Barge has been redelivered to Owner as provided herein.

R. 1244, Ex 1, § 3

status of any claim of the owners, pursuant to 11 U.S.C. § 1110. R. 1336, p.12.

ACBL and the other Debtors eventually returned all the leased barges to the Owners. R. 1364, p.13. After the barges were returned, disputes arose over payment of the Debtors' financial obligations under the Charters, more specifically, what priority the Owners' claims were entitled to in the Chapter 11 proceedings. These issues were litigated in cross motions for summary judgment filed in the Bankruptcy Court and were resolved on January 28, 2004, at an Omnibus hearing. These rulings on the contested legal issues are the basis of the current appeals.

### ISSUES PRESENTED ON APPEAL

In the bankruptcy judge's findings and conclusions on summary judgment, as previously noted in this appeal, the parties' stipulated undisputed material facts were adopted by the bankruptcy court and we shall do the same. Pursuant to § 365(d)(10), whether a claim is entitled to administrative priority turns on the date when an obligation of a lessee first arose. Thus, in analyzing the contested legal issues in this case, the parties, as well as the bankruptcy court, considered the Owners' claimed rights and entitlements in the context of three distinct time periods, organized chronologically, in order to determine which costs and damages qualified as administrative expenses: (1) the first 59 days following the Petition Date (February 1, 2003 through March 31, 2003); (2) the 60<sup>th</sup> day from the Petition Date to the date Debtors' Charters with the Owners were rejected by the bankruptcy court (April 1, 2003 through May 14, 2003), and (3) May 15, 2003 through the dates the barges were returned to the Owners (the post-rejection claims). Undergirding this three-phase analytical template were, what the bankruptcy court termed, the controlling, "essential" rules of bankruptcy law relating to this case:

First, a debtor has a right to reject executory leases and



treat claims arising thereby as pre-petition unsecured claim(s). Secondly, in order to be entitled to an administrative expense claim under § 503(b)(1)(A), the estate must receive a benefit from the transaction between the creditor and the debtor. (Citation omitted.) (Third,) a lessor is generally entitled to an administrative claim under § 503(b) for the fair rental value of the lessor's property actually used by the debtor. (Citation omitted.)

R. 1593, ¶ 3, Findings of Fact, Conclusions of Law and Order, April 28, 2004.

In its summary judgment ruling, the bankruptcy court significantly limited the administrative claims of Owners, ruling that they were entitled to an administrative priority for monthly charter hires for barges leased to Debtors during the month of April, 2003; for barges returned prior to May 14, 2003, (the date of the Rejection Order), an administrative priority was allowed at monthly charter hire rates for the entire month of May. However, for barges returned after the Rejection Date, Owners were entitled to administrative priority only for daily charter hire until such times as the barges were made available to Owners for pick up.

Though the bankruptcy court held that Owners were entitled to an administrative claim for Debtors' use and possession of the barges during the first fifty-nine days of the case, the amount of those claims in terms of the "fair rental value" of the barges could not be determined at that point in the proceedings, based on the evidence before the bankruptcy judge, and so summary judgment was denied as to the amount due Owners.

In resolving the issues presented in this appeal, the effective date of the Rejection Order is crucial. The bankruptcy court stated that only "[n]ormally accruing, current claims which first arose after the Petition Date and prior to the rejection of the Charters, such as claims for post-petition damages to the Barges, are within the scope of § 365(d)(10) and entitled to administrative status, whereas claims which arise only because of the rejection of the Charters are not within the reach of § 365(d)(10)." R. 1593 ¶ 5.C.

In summary, the bankruptcy court allowed administrative priority for monthly charter hire for the month of April, 2003, and, for the month of May, for barges returned prior to the Rejection Date. For barges returned after the Rejection Date, the administrative priority was limited to the amount for daily charter hire. Off Charter Expenses and other expenses (including attorneys fees) arising as a result of the rejection of the Charters were classified as unsecured pre-petition rejection damages, and the allowable administrative expense claims were in any event not entitled to immediate payment.

This appeal challenges the following decisions by the bankruptcy court, distilled by us as follows:

1. That Owners' damages for Off-Charter Expenses/Obligations and other expenses arose from Debtors' rejections of the Charters and thus were properly classifiable as unsecured,

pre-petition rejection damages; appellants contend that those damages arose under the Charters prior to rejection and thus are covered by § 365(d)(10);

2. That Debtors were obligated to pay only daily charter hire for barges used and returned after the May 14, 2003 Rejection Order; appellants argue that Debtors were obligated to pay and perform “all obligations” accruing under the Charters after May 14, 2003 under § 365(d)(10);

3. That Owners may only recover attorneys fees undertaken to enforce their rights under the Charters consistent with § 365(d)(10), and the payment of fees was deferred to a later time; appellants maintain that they are entitled to timely payment of attorneys fees as a post-petition and pre-rejection obligation.

4. That administrative expenses arising on or after April 1, 2003, need not be paid immediately, without interest accruing; appellants contend that the bankruptcy code requires timely payment for all administrative obligations arising under § 365(d)(10).

5. That Owners’ acts of re-chartering their barges to other companies mitigated their damages, causing a forfeiture, or at least a reduction, in the amount of their claims; appellants maintain that they should not be penalized for having acted in this commercially reasonable way and, while § 365(d)(10) places no duty on them to mitigate claims against a debtor in a bankruptcy estate, having done so they should not be penalized by a required forfeiture of any accrued payments that Debtors were otherwise obligated to make under the terms of the Charters.

Debtors defend the bankruptcy court’s summary judgment rulings as a correct refusal to grant administrative priority to the Owners’ rejection damages, noting that § 365(d)(10) imposes certain obligations on a debtor only until a lease is assumed or rejected unless the court orders otherwise “based on the equities of the case.” The judge’s transition plan in this case allowed

for the return of the barges “in the most efficient, economical and equitable manner,” and, following rejection of the Charters, all damages arising thereunder were properly classified as general, unsecured pre-petition damages. Appellees’ Br. at 7.

### LEGAL ANALYSIS

Chapter 11 of the Bankruptcy Code treats the Charters regulating the leasing of the barges used by Debtors as unexpired leases of personal property. Section 365(a) authorizes a chapter 11 debtor to reject an unexpired lease, subject to court approval, which the debtors in this case opted to do. Section 365(d) details a debtor's duties under a nonresidential lease between the time the debtor files for bankruptcy protection and rejects an unexpired lease. The provision applicable to the Charters is § 365(d)(10), which provides in full, as follows:

The trustee shall *timely perform all of the obligations of the debtor*, except those specified in § 365(b)(2), first arising from or after 60 days after the order for relief in a case under chapter 11 of this title under an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household purposes), until such lease is assumed or rejected notwithstanding § 503 (b)(1) of this title, *unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof*. This subsection shall not be deemed to affect the trustee’s obligations under the provisions of subsection (b) or (f). Acceptance of any such performance does not constitute waiver or relinquishment of the lessor’s rights under such lease or under this title.

11 U.S.C. § 365(d)(10) (emphasis added).

The rejection of a lease relieves a chapter 11 debtor from paying burdensome obligations arising under an unexpired lease, but, correspondingly, the Code also ensures lessors a form of “current payment” for “current services provided,” that is, for a debtor’s use of leased property between the petition and rejection dates. Thus, subject to certain requirements, the lessor is entitled to administrative expense priority for unpaid obligations arising post-petition, pre-

rejection. See In re TreeSource Industries, Inc. 363 F.3d 994 (9th Cir. 2004) ; In re Best Products, 206 B.R. 404, 406 (Bankr. E.D. Va. 1997).

Owners' appeal challenges the bankruptcy court's determinations as to which expenses fall within the administrative claim priority. In general, damages flowing from the rejection of a lease are not entitled to an administrative priority because they are considered damages for the breach, rather than naturally accruing costs under the on-going lease. Title 11, § 502(g) of the Bankruptcy Code establishes parity between claims arising from the rejection of an unexpired lease of the debtor that has not been assumed and other pre-petition claims, directing that they be considered "the same as if such claim had arisen before the date of the filing of the petition." Consequently, a lessor's claim is treated as any other pre-petition claim for payment from the debtor's estate, equal in priority of distribution with other unsecured creditors. In re TreeSource Industries, Inc.; In re El Paso Refinery, L.P., 220 B.R. 37, 45 (Bankr. W.D. Tex. 1998).

However,

§§ 365(d)(3) and (10) ensure that lessors are properly compensated for a debtor's use of leased property post-petition by way of granting administrative expense priority to the claim of a lessor. In general, however, "(a)ministrative expense claims should be narrowly construed." 154 B.R. 733, 736 (Bankr.D. Minn. 1993)

A. Obligations arising under Section 365(d)(10).

The bankruptcy court ruled that § 365(d)(10) "only mandates that Debtors pay the Contract rate with respect to Barges returned to Claimants from April 1, 2003 through May 14, 2003." R. 1593 ¶ 5. Other related obligations under the Charters, such as off-charter surveys and repair damages, were not entitled to administrative priority since they arose pre-petition, according to the court. The Charters obligated Debtors to undertake all necessary repairs on an

on-going basis as conditions dictated, and the requirement to conduct the surveys accrued only “upon redelivery” of the barges and “upon the expiration” of the Charters, preventing them from being treated, as the court held, as “normally accruing” obligations. Accordingly, such repair damages and related obligations did not “first (arise) from or after 60 days after the” Rejection Order, and “(c)laims for pre-petition damages must be treated as unsecured pre-petition rejection claims.” R. 1593 ¶ 5.B.

Further, the bankruptcy court reasoned that because most of the barges were returned to Owners after April 1, 2003, but before the Rejection Date, the redelivery charges and Off Charter Expenses, as well as attorneys’ fees associated with their early return, were not entitled to administrative priority under § 365(d)(10).

#### *1. Off-Charter Expenses*

The bankruptcy court ruled that the Off-Charter Expenses for the repair of the surveyed damages and dry-docking were rejection damages and therefore outside the scope of § 365(d)(10). We agree with this conclusion. In making this determination, the court referenced the provisions of the Flowers and JEM Charters, noting that they “explicitly impose obligations such as off-charter surveys ... and repairs .... only ‘upon redelivery’ and ‘upon the expiration’ of the Charters.” R. 1593 ¶ 5F. The Flowers and JEM Charters provide:

(a) *Upon the expiration of this Charter*, the Barges, ... shall be *redelivered*, at Charterer’s expense to Flowers [or JEM], empty, cleaned and in as good condition and working order as when first delivered to Charterer for service under the Original Charter, ordinary wear and tear only excepted. [...]

(b) *Upon redelivery or repossession*, each of the Barges shall be *dry docked and surveyed* ... If repairs are necessary in order to bring the Barges into the condition required on redelivery under this Charter, said repairs shall be promptly made by Charterer, at its expense and

cost. It is understood and agreed that Basic Charter Hire shall continue during such period as may be reasonably necessary to survey any Barge and, if necessary, to complete the repairs.

R. 1241, Exs. 1-4, § 13; R. 1238, Ex. 1, § 13 (emphasis supplied).

Similarly, the PML Charter provides:

(a) *Upon expiration of the Charter Period, Charterer shall redeliver the Barges, ... in the same good order and condition as when delivered, ordinary wear and tear excepted.*

R. 1244, Ex. 1, § 3 (emphasis supplied)

In a non-bankruptcy context, the obligation to dry dock, survey and complete repairs, is triggered by redelivery *following* the expiration or termination of the Charters. R. 1593 ¶ 5F. In a bankruptcy context, the Charters expired with the Debtors' rejection of the agreements. For those barges that were returned after the May 14, 2003, Rejection date, the Off-Charter obligations clearly arose post-rejection and are therefore not within the scope of § 365(d)(10). For those barges returned to Owners before May 14, 2003, the Bankruptcy Court reasoned that their redelivery to Owners constituted a *de facto* rejection, so that any lease obligations arising post-redelivery were also post-rejection.

Owners contend that these rulings were erroneous because the early return of collateral can never constitute an effective rejection under § 365(d)(10), according to the holding in Paul Harris Stores, Inc. v. Mabel L. Salter Realty Trust, 148 B.R. 307 (Bankr. S.D. Ind. 1992) (McKinney, J.). Our review of that decision does not convince us of the correctness of Owners' view. In addition to the fact that Paul Harris is not binding precedent here,<sup>7</sup> that decision is

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<sup>7</sup>Under the principle of stare decisis, a decision of a federal district court judge is not  
(continued...)

distinguishable both on its facts and law.

In Paul Harris, the lessor sought an administrative priority under 11 U.S.C. §365(d)(3) for post-petition, pre-rejection rent for a commercial retail store site. Section 365(d)(3) is similar, though not identical, to (d)(10) in requiring a debtor-in-possession to “timely perform all obligations ... arising from ... any unexpired lease of nonresidential real property” between the petition date and the rejection of the lease. The debtor argued that its lease obligations were curtailed once it had indicated to the landlord, clearly and unequivocally, that the lease was being rejected. Paul Harris, 148 B.R. at 309. The debtor maintained that once it had vacated the store site and told the landlord it planned to reject the unexpired leases in March 1991, a month after filing for Chapter 11 bankruptcy, it was off the hook for the ensuing rent. The debtor in Paul Harris moved for court approval of the rejection of this lease in July 1991 and did not pay any rent under the unexpired lease in the intervening months. Judge McKinney, relying on the “better reasoned case law and considerations of fairness,” concluded that “the rejection of a lease under § 365 is effective only after approval by the bankruptcy court ... instead of when an act of rejection is first taken.” Id. at 313.

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<sup>7</sup>(...continued)  
binding precedent in the same judicial district or even upon the same judge in a different case. In some districts, however, a district court decision may have stare decisis effect on bankruptcy courts in that district. 18 *Moore’s Federal Practice*, § 134.02[1][d] (Matthew Bender 3d ed.)



Owners ask us to impose, as a bright line rule, the requirement that a court order is always a condition precedent to an effective rejection. Obviously, that rule would necessitate that we reverse the bankruptcy court's determination in this case that redelivery of any barges prior to the official entry of the Rejection Order constituted *de facto* rejection of the leases. The conclusion in Paul Harris arose from the actions of a debtor who resorted to self-help by vacating a property and failing to pay rent for many months while deciding whether to reject the leases. In the case at bar, Debtors did not declare themselves relieved of the obligation to pay charter hire once they redelivered the barges; rather the bankruptcy court made that determination when faced with the impracticality of Debtors turning over possession of all 135 barges to the Owners at one time, namely, on the date of the Rejection Order. With redelivery effecting the expiration of the leases, the Owners were free to re-charter many of the barges well in advance of the Rejection Order, and in fact did just that.<sup>8</sup> Appellees' Br. at 14; Appellants' Br. at 14. The bankruptcy court's decision that the redelivery of the barges should be deemed a *de facto* rejection of the Charters, even though the redelivery occurred in advance of the entry of the actual rejection order, does not go contrary to any Seventh Circuit precedent, and, in our judgment, represents a fair exercise of the court's equitable power under the Code, which expressly anticipates the need to exercise such discretion by including the words, "... unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof." Section 365(d)(10); R. 1593 ¶5.A.

Owners further contend that the contractual obligation to continue paying charter hire during repairs to the barges, as set out in §13(b) in the Flowers and JEM Charters and §3(e) in

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<sup>8</sup>According to Appellees, 112 barges were re-chartered within five days of redelivery to the Owners.

the PEM Charter, makes obvious that redelivery would not be final until the Off-Charter Survey had been completed. Appellants' Br. at 19-20. Yet, the obligation to repair damage identified by a marine survey clearly could not have preceded the redelivery of the barge. Nor is it a recurring obligation once the lease is terminated (or in this case, rejected). The bankruptcy court found particularly instructive a recent decision arising under the same Code provision that is at issue here also involving the rejection of leases for marine containers: In re Muma, 279 B.R. 478, 487-88 (Bankr. Ct. D. Del. 2002). There, the court reasoned that charges for repairs arose only after the return of the containers, and therefore were not obligations arising on a current basis under the leases. Similarly, in Ames, commercial lessors had a clean-up obligation under a pre-petition, unexpired lease, and the court determined that clean-up costs were obligations which arose only upon termination of the leases, and that any § 365(d)(3)<sup>9</sup> obligations ended upon its rejection of the leases. In re Ames Dept. Stores, Inc., 306 B.R. 43, 58 (Bankr. Ct. S.D.N.Y. 2004).

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<sup>9</sup>11 U.S.C. § 365(d)(3) is similar enough to (d)(10) that courts often construe them in the same manner. See e.g. Muma, 279 B.R. at 487.

Our reading of the Charters, in light of these cases and the Bankruptcy Code, prompts us to affirm the bankruptcy court's rulings with regard to the disallowance of administrative priority for these obligations accruing after rejection of the agreements. Specifically, we hold that: (1) all Off-Charter Expenses were triggered by redelivery of the barges; (2) the redelivery of the barges between April 1, 2003, and May 14, 2003, fairly constituted *de facto* rejections of those leases; and (3) obligations arising post-rejection are expressly not entitled to administrative priority under § 365(d)(10).

*2. Daily Charter Hire for Barges returned after May 14, 2003.*

Owners argue that the bankruptcy court's allowance of an administrative priority only for daily charter hire for Debtors' use of the barges after May 14, 2003, the date the Charters were deemed rejected, cheats Owners out of the monthly charter hire and Off-Charter Obligations to which they were entitled under those agreements. Owners maintain that they were entitled to the immediate payment of the amounts accruing under the Charters, monthly hire and other Off-Charter Obligations under § 365(d)(1) until the time Debtors returned to the Owners the use of their barges. Debtors respond that the bankruptcy court properly exercised its discretion in imposing this limitation on payment under the bankruptcy code.

In reviewing the decision to foreclose payment by Debtors of full charter hire from the entry of the Rejection Order on May 14, 2003, until the remaining barges were returned, we are guided by the analysis in HA-LO Industries. There, the Seventh Circuit held that where a debtor's rent obligation arose entirely post-petition and pre-rejection, even though it covered in part a period of time after the lease's rejection, the debtor was required to pay a full month's rent and not just pro-rated rent for those few days of the month that it actually occupied the premises. HA-LO Industries, Inc. v. Centerpoint Prop. Tr., 342 F.3d 794, 798 (7th Cir. 2003). The Seventh

Circuit's conclusion in HA-LO reflects its interpretation of the language of § 365(d)(3) as well as the equities of the situation before the court. Id. at 800. HA-LO Industries elected to reject a commercial lease effective the second day of the month, two days after the monthly rent obligation arose, and pay the landlord only for the few days it continued to occupy the premises rather than the full month's rent. The Court commented that the debtor could have avoided the obligation for a full month's rent simply by electing to reject the lease on the last day of the month; thus it ordered the debtor to pay the remainder of the month's rent.

Here, the terms of the Charters impose an obligation to pay monthly charter hire as of the first day of the month, and the first day of May was squarely in the post-petition, pre-rejection period referenced in § 365(d)(10). Thus, Debtors' obligation to pay the full month's rent for those barges in their possession and use during May 2003 arose on the first day of the month. The decision in Ha-Lo and § 365(d)(10) permit Owners to treat that entitlement as an administrative expense for monthly, rather than daily, charter hire for all barges in use during the month of May 2003.

The bankruptcy court, in Conclusion 7 et seq., ordered Debtors to pay a full month of charter hire at the contract rate for all barges returned in April, 2003, (regardless of the specific date the barge was returned) which amount was entitled to administrative claim priority. For barges returned between May 1, 2003 and May 14, 2003, Debtors were required to pay the contract rate for the entire month of May, 2003. However, for barges returned after May 14, 2003, Debtors were required to pay only daily charter hire until the barges were returned to Owners.

We conclude that the bankruptcy court's decision as reflected in Conclusions of Law 6.A<sup>10</sup> and 7 and the Summary Judgment Order must be modified to reflect the Seventh Circuit holding in Ha-Lo, allowing Owners an administrative priority in the amount of the monthly charter hire at the contract rate for the month of May 2003, for all barges returned to them during that month.

Approximately two-thirds of the barges were returned prior to the May 14, 2003, rejection date. Thereafter, all the barges were returned at varying times in late May, June, July and August, 2003. Owners contend that this arrangement allowed Debtors to avoid their contractual responsibilities while using the Owners' barges after May 14, 2003. Yet, for the purposes of § 365(d)(10), the contractual lease obligations ended with the rejection of the Charters. Owners' claims that they are entitled to administrative priority for monthly charter hire in June, July and August is not supportable for two reasons: first, the obligation to pay a full

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<sup>10</sup> The bankruptcy court stated, "The Court recognized that decommissioning and turning possession of the Barges over to Claimants could not occur at one instant in time and would occur over a period of time. Accordingly, the Rejection Order provided that the Debtors were to pay *daily* charter hire after the Rejection Date and until a Barge was made available to Claimants for pick up. Off Charter Expenses for Barges returned after the Rejection Date are not entitled to administrative priority."

month's rent for June 2003, for example, would have arisen on June 1, which date was post-rejection, as was true for the months of July and August time periods as well. Alternatively, § 365(d)(10) grants statutory discretion to "order otherwise," allowing the court to fashion a remedy such as this in the light of the equities of this case.

In conclusion, the bankruptcy court's order entitling Owners to an administrative priority for *daily* charter hire only is AFFIRMED in part, and REVERSED/MODIFIED in part.

### 3. *Attorneys Fees*

Flowers and JEM appeal the Bankruptcy Court's refusal to summarily resolve their request for administrative priority under 11 U.S.C. § 365(d)(10) for attorneys' fees. The Owners allege that the fees were incurred during and after the § 365(d)(10) period for services pertaining to the preparation and filing of Owners' Motions for Allowance and Payment and were also mandated by §§ 10 and 20 of the Charters. Appellants' Br. at 31. The bankruptcy court opined that a resolution of the issue of entitlement to attorney fees involves a question of fact, namely, whether the attorneys' fees were expenses generated by the enforcement of contractual rights under the charters or by enforcement of rights under the Code. R. 1593 ¶ 5G. This is an important distinction. Attorneys' fees associated with the enforcement of rights under the unexpired leases are compensable, whereas those associated with enforcement of the Code are not. See In re Geonex Corp., 258 B.R. 336, 340 (Bankr. D. Md. 2001) (holding that pursuant to § 365(d)(3), [a landlord is] entitled under applicable state law and the terms of the lease to the reimbursement of all of the counsel fees it was required to expend to enforce its right to payment of rent, from the petition date down to the present); In re Shangra-La, Inc., 167 F.3d 843 (4th Cir. 1999) (holding that according to Fourth Circuit precedent, as a condition of the assumption

of an unexpired lease, a trustee must assume all obligations of the defaulting debtor under the lease, including the payment of the lessor's counsel fees that were expended to collect unpaid rent); In re Crown Books Corp. 269 B. R. 12, 17 (Bankr. D. Del. 2001) (holding that the correct analysis is whether the actions undertaken by the landlords were to enforce their rights under the leases in a manner consistent with § 365 (which would be compensable) or whether they sought to contest the debtor's rights under the Bankruptcy Code (which are not compensable)).<sup>11</sup>

We concur in the bankruptcy court's conclusion that the applicable law on Owners' attorneys' fees request requires further factual development regarding the basis for any entitlement before the court can decide whether the fees fall within the scope of § 365(d)(10). Thus, we AFFIRM the bankruptcy court's decision to deny summary judgment on this issue.

#### *4. Mitigation of Damages*

Owners challenge the bankruptcy court's holding that their administrative expense claims were forfeited (or reduced substantially) by their re-chartering of the returned barges upon Debtors' redelivery of the vessels to them. In this regard, they seek clarification of what Owners characterize as inconsistent determinations by the bankruptcy court concerning the effects of Owners' mitigation of their claims. As argued by Owners,

In its Order, the bankruptcy court held that “[c]laimants are not entitled to administrative priority for damages

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<sup>11</sup>We note that not all courts take this approach. In Geonex, 258 B.R. at 341, the Court cited an array of cases that favored the rule that “[c]ounsel fees are allowed to the landlord in connection with its administrative rent claim if authorized by the terms of the lease” and those which disagreed. The contrasting approach construes administrative claims very narrowly and treats § 365(d)(3) as unambiguously requiring the “timely performance” of rental obligations but finding the statutory language ambiguous as to a debtor/tenant's duty to reimburse a landlord's attorney fees (citing In re Pudgie's Dev. of N.Y., Inc., 202 B. R. 832, 836 (Bankr. S.D.N.Y. 1996)).

that were mitigated by re-chartering the barges.” However, two paragraphs later, the bankruptcy court stated that [c]laimants shall be allowed an administrative claim, but the amount is determined by the net loss to the lessors.

Appellants’ Br., p. 34.

Debtors respond that the bankruptcy court’s order was obviously based on considerations of fairness and that Owner’s attempt, through this appeal of the summary judgment order, is “particularly unpalatable and wholly inconsistent with the equitable intent of the Bankruptcy Code. Appellees’ Br., p. 29. The purpose of § 365 is to ensure that a particular creditor is not harmed for providing benefit to the estate or to ensure that a lessor is compensated for the continued use of its property. In this case, when the barges were re-let to third parties after Debtors redelivered them to Owners, there is no need for administrative prioritization of damages that were essentially avoided.

Owners contend that § 365(d)(10) places no duty to mitigate a lessor’s claims against a Chapter 11 debtor. We concede that the bankruptcy court’s articulation of its reasoning here gives rise to some confusion, but we perceive a reasonable interpretation of its broad holding in ¶ 8 nonetheless, by reading ¶ 8.B to modify §8:

Claimants are not entitled to administrative priority for damages that were mitigated by re-chartering the Barges.

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Upon their return to Claimants, the Barges were re-chartered to third parties. The Claimants cannot receive an administrative priority claim for rent for property that Claimants had placed in the control of third parties. *Claimants shall be allowed an administrative claim, but the amount is determined by the net loss to the lessors.*

R. 1593, ¶¶ 8 and 8B (emphasis supplied). The holding in the second paragraph of the



bankruptcy court's entry is clarified by adding the following words to the beginning of the final sentence: "To the extent that rents were lost to Claimants between redelivery of the barges and their re-letting to third parties ...." This interpretation is implicit in the bankruptcy court's holding, allowing us to modify those conclusions accordingly.

Owners, understandably, do not object to the language of ¶ 8.B whereby they were allowed "an administrative priority claim equal to the gross amounts provided by the Charters less only the actual amounts received from the new charterers." Appellants' Br. at 33-34. Owners acknowledge in their brief that their claim should be a net claim, "less the actual amounts received from the new charterers."

Debtors also have characterized Owners' position here in terms of Owners being "entitled to administrative priority claims for the rent Debtor's owed on the Charters." Appellees' Br. at 29.

We are unclear, therefore, whether the parties actually are in disagreement with each other or with the bankruptcy court, for that matter. Both parties cite In re Fifth Ave. Jewelers, 203 B.R. 372 (Bankr. W.D. Penn. 1996), a case which deals with pre-petition, rejection damages for the breach of an unexpired real property lease under both § 502(b)(6), imposing a cap on unsecured claims, and § 365(d)(3). Owners cite this holding for the rule that any duty to mitigate would arise under state law and not the Code; however, that principle is stated in the portion of the Fifth Ave. Jewelers opinion that refers to § 502(b)(6). On the other hand, the opinion also refers to administrative expense claims under § 365(d)(3) whereby the court concluded that the lessor's administrative claim for the statutory period (post-

petition, pre-rejection) should be reduced by the amount of payments that it received by re-letting the commercial property to alternate tenants. *Id.* at 384. Our understanding of the parties' arguments leads us to believe they are in agreement with one another. Further, having clarified the bankruptcy judge's decision by our modification in order to make clear this holding, we now affirm the bankruptcy court's decision regarding this mitigation.

*5. Immediate Payment of Section 365(d)(10) Lease Obligations.*

Our research discloses no single, prevailing view among courts as to whether the administrative expense claims are entitled to immediate payment by debtors to claimants. Here, the bankruptcy court ordered, "The Claimants' administrative expense claims are not entitled to immediate payment." R. 1593 ¶ 5, p. 12. The court referenced the "timely performance" provision in § 365(d)(10), stating that that language was an insufficient basis on which to elevate a lessors' claim to super-priority status. Instead, it concluded, "[t]he Code simply requires payment of administrative expenses on the effective date of the plan pursuant to 11 U.S.C. § 1129(a)(9)(a)." R. 1593, ¶ 8.C.

Owners argue that the statutory language of "timely performance" in § 365(d)(10) is equivalent to mandating "super priority" of payment. Appellants' Br. at 31. Debtors rejoin that not only is super priority of payment not mandated by the statute, but it subverts the goal of ensuring that all the debtor's creditors receive fair and equitable distributions from a Chapter 11 bankruptcy estate. Appellees' Br. at 1, 30.

Our understanding of this disagreement is well-summarized in the following excerpt from Norton's familiar treatise on bankruptcy:

"Courts recognizing that the rent called for in the lease establishes the proper measure of rent payable under Code § 365(d)(3) as an

administrative priority divide along two lines with respect to whether that rent is entitled to "ordinary" administrative priority or to a heightened level of priority, referred to as "superpriority." Those courts recognizing a superpriority administrative claim require immediate payment of pre-rejection rent even when it appears that the landlord may receive a better treatment than other administrative priority claimants because funds may be insufficient to pay all administrative claims. Other courts, not finding a specific direction that Code § 365(d)(3) obligations receive superpriority, decline to order payment when doing so would have the practical effect of granting such priority. Some courts which do not recognize a superpriority status, however, direct the rent be timely paid with payments subject to recapture in the event estate assets prove insufficient to pay all administrative claims. It has been observed that the majority of cases interpreting Code § 365(d)(3) hold that payments made pursuant to the subsection are administrative expenses and, because Congress did not specifically provide for "superpriority" treatment, such payments may be made only to the extent that other administrative claims are paid."<sup>12</sup>

2 Norton Bankr. L. & Prac. 2d § 39:42.

In the absence of Seventh Circuit precedent and no clearly defined view among other district or bankruptcy courts, we return to the statute. According to § 365(d)(10), the "trustee shall timely perform" lease obligations that arise within a prescribed statutory period, "unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof."

We note that the statute under review in the cases cited in footnote 11, supra, as well as those cited in § 39.42 of the Norton's excerpt, supra, is 11 U.S. C. § 365(d)(3), rather than § 365(d)(10). Although similar in many ways, the court's discretion to alter the obligations of the

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<sup>12</sup>The cases supporting the view that § 365(d)(3) confers only ordinary administrative claim priority include, among others: In re Orvco, Inc., 95 B.R. 724 (9th Cir. 1989) (overruled on other grounds); In re Pudgie's Development of NY, Inc., 239 B.R. 688 (Bankr. S.D.N.Y. 1999), In re Joseph C. Spiess Co., 145 Br. 597 (Bankr. N.D. Ill. 1992); But see, for the opposite view: In re Telesphere Communications, 148 B.R. 525 (Bankr. N.D. Ill. 1992); In re Narragansett Clothing Co., 119 B.R. 388, 391 (Bankr. D. R.I. 1990).

debtor appears more limited in § 365(d)(3) than in § 365(d)(10), the former providing: “The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period.” 11 U.S.C.A. § 365(d)(3). Section 365(d)(10) affords the bankruptcy court greater flexibility and greater latitude without creating super priority status respecting administrative claims within its scope.

We are satisfied that the bankruptcy court properly exercised its lawful discretion under the statute, when it expressly took into account “the circumstances of these chapter 11 cases and the large number of potential claimants” and noted that if the court were to allow “immediate payment of Claimants’ administrative claims (it) could result in inequitable treatment for similarly situated claimants.” R. 1593 ¶ 8C. These are equitable considerations which, we repeat, the bankruptcy court is authorized to factor into the decision making in a particular case by relying on the qualifying condition, “ordered otherwise,” with respect to the timely performance of the lease obligations.

The court elaborated its view that the “timely performance language of § 365(d)(10) is not sufficient to elevate a lessors’ [sic] claim to super-priority status” and thus “the Claimants’ administrative expense claims are not entitled to immediate payment.” R. 1593, p. 12. Interest, obviously, would not accrue until after final payment of the administrative claims is ordered due by the bankruptcy court. We find no abuse of discretion here, and our *de novo* review results in our concurrence with the bankruptcy court’s decision to delay payment of the administrative expenses until further order of the court. Accordingly, we AFFIRM this ruling to defer payment.

## CONCLUSION

For the reasons explained above, we AFFIRM the following Findings of Fact, Conclusions of Law and Order entered by the Bankruptcy Court: (1) Rejection of the charters occurred at the earlier of either the entry of the Rejection Order or the time the barges were returned, and application of the principle of de facto rejection for barges returned prior to the Rejection Order which recognized that the return of the barges prior to the expiration of the charters had occurred in anticipation of the Rejection Order; (2) Off-Charter expenses and other expenses arising as a result of the Debtors' rejection of the Charters are not entitled to administrative priority, pursuant to 11 U.S.C. § 365(d)(10), and if later proved, will be classified as unsecured pre-petition rejection damages; (3) the Owners are not entitled to administrative priority for damages that were mitigated by re-letting the barges; (4) Section 365(d)(10) does not mandate immediate payment of the Owners' administrative expense claims; (5) the Owners' request for attorneys' fees is ripe for summary determination because a resolution of the issue will entail unresolved issues of fact.

For the reasons stated above, we REVERSE and MODIFY the Bankruptcy Court's determination that the Owners are entitled to administrative priority for monthly charter hire only for April 2003, based on the Seventh Circuit decision in HA-LO, and order Debtors to pay monthly charter hire for barges returned during the entire month of May

2003, as well, and daily charter hire for barges in use and not returned to Owners until June, July or August.

It is so ordered.

Date: \_\_\_\_\_

\_\_\_\_\_  
SARAH EVANS BARKER, JUDGE  
United States District Court  
Southern District of Indiana

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